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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----	x	Case No. ____-____
	:	
In re	:	On appeal from the United States Bankruptcy
	:	Court for the Southern District of New York
DELPHI CORPORATION, <u>et al.</u> ,	:	
	:	Chapter 11
Debtors.	:	Case No. 05-44481 (RDD)
	:	(Jointly Administered)
-----	x	

DEBTORS' ANSWER TO MOTIONS OF H.E. SERVICES COMPANY AND
ROBERT BACKIE FOR LEAVE TO APPEAL

Delphi Corporation ("Delphi") and certain of its subsidiaries and affiliates,
debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors"),

hereby submit, in accordance with Rule 8003(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), this answer to the motions (Bankruptcy Docket Nos. 5206 and 5207) of H.E. Services Company and Robert Backie, Majority Shareholder (collectively, "H.E. Services") for leave to appeal, under Bankruptcy Rule 8003, from the August 11, 2006 Order (Bankruptcy Docket No. 4897) of Bankruptcy Judge Robert D. Drain (the "Bankruptcy Court Order"), which denied H.E. Services' request for relief from the automatic stay to pursue a state court claim,¹ and respectfully represent as follows:²

1. The Motion seeks interlocutory review of the Bankruptcy Court Order under 28 U.S.C. § 158(a)(3). The Motion, however, appears unnecessary because the Bankruptcy Court's order denying relief from the automatic stay to pursue various claims in a nonbankruptcy forum is apparently a final order that would be entitled to appeal as of right under 28 U.S.C. § 158(a)(1). See, e.g., Sonnax Indus. v. Tri Component Prods. Corp. (In re Sonnax Indus.), 907 F.2d 1280, 1284-85 (2d Cir. 1990) (holding that denial of relief from automatic stay in bankruptcy is equivalent to permanent injunction and is thus final order); In re Chateaugay Corp., 880 F.2d 1509, 1511-12 (2d Cir. 1989); Pegasus Agency, Inc. v. Grammatikakis (In re Pegasus Agency, Inc.), 101 F.3d 882, 885 (2d Cir. 1996); FDIC v. Niagara Mohawk Power Corp.

¹ Because both motions are identical in content, they are referred to herein collectively as the "Motion." Although H.E. Services filed and captioned the Motion and its supporting memorandum as one seeking relief under Bankruptcy Rule 8003, that Rule merely provides the procedural requirements for a party seeking an interlocutory appeal under 28 U.S.C. § 158(a)(3).

² Although the response to the Motion required by Bankruptcy Rule 8003(a) is referred to as an "answer," the Debtors do not believe that the rule requires admission or denial of each factual allegation in the Motion. Nonetheless, the Debtors deny any allegations that the Debtors engaged in discriminatory conduct, violated 42 U.S.C. § 1981, or misled the federal government or H.E. Services.

(*In re Megan-Racine Assocs., Inc.*), 102 F.3d 671, 675 (2d Cir. 1996); *In re MacInnis*, 235 B.R. 255, 258 (S.D.N.Y. 1998).

2. Nevertheless, if this Court were to find that the Bankruptcy Court Order is not a final order appealable under 28 U.S.C. § 158(a)(1), H.E. Services has failed to meet the standard necessary for obtaining interlocutory review. To be eligible for interlocutory review under 28 U.S.C. § 1292(b),³ an order being appealed must involve a controlling question of law over which there is a substantial ground for difference of opinion, and it must be shown that an immediate appeal from the order may materially advance the ultimate termination of litigation. 28 U.S.C. § 1292(b). Additionally, leave to appeal is warranted only when the movant demonstrates the existence of "exceptional circumstances," *see, e.g., In re Alexander*, 248 B.R. 478, 483 (S.D.N.Y. 2000), to overcome the "general aversion to piecemeal litigation," *In re AroChem Corp.*, 176 F.3d 610, 619 (2d Cir. 1999).

3. In its Motion, H.E. Services states that the question to be determined is one of "pure law," i.e., whether a discrimination claim constitutes a personal injury tort claim as that phrase is used in 28 U.S.C. § 157(b)(2), (5), which claim may not be tried by a bankruptcy court. In ruling on the stay relief motion below, however, the Bankruptcy Court did not find the answer to that question dispositive for the purposes of its ruling. Therefore, even if this Court were to decide the question presented in H.E. Services' favor, the Bankruptcy Court Order should not be reversed. In fact, in ruling on H.E. Services' request for relief from the automatic stay, the

³ In deciding whether to grant leave to appeal under 28 U.S.C. § 158(a)(3), reviewing courts, including a majority of courts in this District, have applied the standard set forth in 28 U.S.C. § 1292(b), which governs the appealability of interlocutory District Court orders to the Courts of Appeals. *See, e.g., In re Adelphia Communications Corp.*, 333 B.R. 649, 658 (S.D.N.Y. 2005); *Urban Retail Props. v. Loews Cineplex Entm't*, No. 01 Civ. 8946, 2002 WL 535479, at *4 (S.D.N.Y. Apr. 9, 2002); *In re Alexander*, 248 B.R. 478, 483 (S.D.N.Y. 2000); *In re MacInnis*, 235 B.R. 255, 263 (S.D.N.Y. 1998).

Bankruptcy Court considered eight separate factors (July 19, 2006 Transcript, attached hereto as Exhibit A, at 39:6-18) (Bankruptcy Docket No. 4996), and did not consider the 28 U.S.C.

§ 157(b)(2), (5) issue dispositive.⁴ (June 19, 2006 Transcript, attached hereto as Exhibit B, at 46:6-7 (Bankruptcy Docket No. 4543); July 19, 2006 Transcript 40:9-12.) Thus, the 28 U.S.C. § 157(b)(2), (5) issue actually presents a mixed question of law and fact, which is not suitable for interlocutory review. See, e.g., SEC v. First Jersey Secs., Inc., 587 F. Supp. 535, 536 (S.D.N.Y. 1984) ("The Court's decision to strike the lost files defense was predicated at least in part on specific factual findings [A]n appeal would necessarily present a mixed question of law and fact, not a controlling issue of pure law. Such an order is not appropriate for certification pursuant to 28 U.S.C. § 1292(b).").

4. Similarly, H.E. Services has not made a sufficient showing that there is a substantial ground for difference of opinion. In addition, H.E. Services has made no showing that an appeal from the Bankruptcy Court Order would materially advance the ultimate termination of litigation, or that exceptional circumstances warrant interlocutory review.

Notice

5. Notice of this answer has been provided in accordance with the Bankruptcy Rules. In light of the nature of the relief requested, the Debtors submit that no other or further notice is necessary.

⁴ The complaint that H.E. Services seeks relief from the automatic stay to prosecute in the state court ahead of other creditors (the "Amended Complaint") further illustrates the multifaceted analysis required to determine the stay relief motion. In addition to the discrimination cause of action, the Amended Complaint includes counts for negligent misrepresentation, fraudulent misrepresentation, silent fraud, bad-faith promise, promissory estoppel, breach of contract, and breach of contract under the Uniform Commercial Code. (Amended Complaint attached to Motion as Exhibit 3).

Memorandum Of Law

6. Because the legal points and authorities relied upon are incorporated herein, the Debtors respectfully request that the requirement of the service and filing of a separate memorandum of law under Local Civil Rule 7.1 be deemed satisfied.

WHEREFORE, the Debtors respectfully request that this Court enter an order denying H.E. Services' and Robert Backie's Motion and granting the Debtors such other and further relief as is just.

Dated: New York, New York
October 10, 2006

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP

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Attorneys for Delphi Corporation, et al.,
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Exhibit A

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481

- - - - -x

In the Matter of:

DELPHI CORPORATION,

Debtor.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

July 19, 2006
10:08 AM

B E F O R E:
HON. ROBERT D. DRAIN
U.S. BANKRUPTCY JUDGE

34

1 they may not either be able to hear you or speak to us, so we
2 should --

3 MR. BUTLER: Not a problem. I was just trying to see
4 if they were in the courtroom to save them some time. But they
5 would come later in the agenda anyway at some point, Your
6 Honor.

7 THE COURT: Okay. Very well.

8 MR. BUTLER: Continuing then with the contested
9 docket, the first matter is Docket No. -- or matter number 38
10 on the agenda, which is the H.E. Services Company lift-stay
11 motion at Docket No. 2705. Your Honor will recall that this
12 was dealt with at the last omnibus hearing on a preliminary
13 hearing basis but that the Court adjourned the motion for final
14 hearing at today's omnibus hearing because H.E. Services argued
15 for the first time at the prior hearing that the discrimination
16 aspect of its commercial litigation suit amounted to a personal
17 injury tort claim under 28 U.S.C. 157(b)(5) and thus they
18 argued the bankruptcy court did not have jurisdiction to
19 adjudicate this claim.

20 The Court also, because this had been raised for the
21 first time, granted leave to the debtors if the debtors chose
22 to -- didn't direct us to but gave us leave to file a
23 supplemental objection on that limited issue, which we did. We
24 did file the supplemental objection at Docket No. 4532. And
25 I'm not going to argue that, Your Honor, here. I think the

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1 objection is clear on its face. We've pointed to the cases in
2 the Second Circuit which make it clear that this does not fall
3 within 137(b)(5) here in the Second Circuit and also we
4 distinguished the case is cited by the movant. So we have
5 nothing further, Your Honor, on this matter.

6 THE COURT: Okay.

7 MR. MASTROMARCO: Thank you, Your Honor. Victor
8 Mastromarco on behalf of Mr. Backie and H.E. Services. And I'd
9 like to indicate in response to their position set forth in
10 their brief that there's no mention of the fact either here
11 today or in their brief that Mr. Backie is an individual
12 plaintiff in the case. H.E. Services is also seeking that same
13 protection under the U.S. Constitution Section 1981. And,
14 again, H.E. Services is an individual as defined under Section
15 1981 in the case law.

16 The cases that are cited by the debtor in their brief
17 to the Court invite the Court to determine -- well,
18 essentially, there's a narrow issue for the Court, as I see it.
19 And that is, whether or not 157(b)(5) is to be given a narrow
20 construction or a broad construction or somewhere in between.
21 The defendants have been taking the position, essentially
22 citing two very old cases, that the Court should narrowly
23 construe 157(b)(5) and to do so, the Court would have to strain
24 and change the plain language of 157(b)(5). The defendants
25 want this Court to include the words bodily injury into the

1 statute. And it's not included. And I'm reading the
2 157(b)(5). In pertinent part it reads, "the district court
3 shall order that personal injury tort and wrongful death claims
4 shall be tried in the district in which the bankruptcy case is
5 pending or in the district court in the district where the
6 claim arose as determined by the district court where the
7 bankruptcy case is pending."

8 The narrow approach, as I indicated, would require
9 this Court to construe that statute as putting words in there
10 that, strictly construed, it doesn't have. And, certainly,
11 Congress, Your Honor, knew how to say the words personal bodily
12 injury when it wanted to. As an example, see 11 U.S.C. Section
13 522(d)(1).

14 This also -- this type of approach invites the Court
15 to interpret pleadings that were drafted, and certainly in this
16 case, before this proceeding was filed. Again, the case is
17 cited by the defendants. There's only two of them that are
18 cited in their brief. This Vinci case, V-I-N-C-I, versus Town
19 of Carmel and there was another case, too. It was the Cohen
20 case. These cases are seventeen years old and have been
21 heavily criticized by the Circuit.

22 As an example, in the case that I cited to the Court
23 during the last omnibus hearing was the In Re Ice Cream
24 Liquidation, Inc. case and in that particular case, which, by
25 the way, is the only case that's been cited to the Court where

1 Section 1981 is being discussed, in that particular case,
2 certainly the Court took a middle ground in reviewing these
3 things. And, basically, the Court talked about how some of the
4 Circuits have taken this position of a broad construction. The
5 Court didn't think that that was necessarily the way to go but
6 also the Court looked at the narrow construction and rejected
7 that out of hand. I would note that what's important in the In
8 re Ice Cream Liquidation case is if 157(b)(5) is applicable,
9 then this Court does not have jurisdiction to make any
10 decisions as to the discrimination portion of the complaint.
11 Certainly, and I would just read from that case just briefly
12 here, if I could, Your Honor, "here it is not necessary for
13 this Court to determine whether it has any jurisdiction" -- and
14 italicized "any" -- "under Section 157(b)(5) over that portion
15 of the claim objection dealing with the sexual harassment
16 successor liability claim or whether such jurisdiction would be
17 core or noncore under Section 157(b)(2). That is because
18 plaintiff's arguments for relief from stay and abstention only
19 grow stronger as the Court's jurisdiction in respect of the
20 sexual harassment successor liability claim is diminished. As
21 will be apparent from discussion below, the key consideration
22 here is that this Court has no" -- and italicized -- "no
23 jurisdiction to try that portion of the claim objection which
24 relates to the sexual harassment successor liability claim."
25 And, Your Honor, that's a 2002 opinion. And that's how the

1 Courts have interpreted 157(b)(5), not based on some eighteen
2 year old case on a bankruptcy that was filed in 1981.

3 THE COURT: What was the section you quoted to me?
4 Didn't you say 1122? I just didn't hear it.

5 MR. MASTROMARCO: Just a moment. If I wrote it down
6 wrong, I apologize. I believe it was 11 U.S.C. 522 --

7 THE COURT: 522.

8 MR. MASTROMARCO: --(d)(1).

9 THE COURT: Okay.

10 MR. MASTROMARCO: And those words appear in that
11 particular section. I mean, certainly, again --

12 THE COURT: No, no. I just wanted to make sure I
13 heard it. I thought I heard you incorrectly.

14 MR. MASTROMARCO: We ask for strict construction of
15 the statute, Your Honor.

16 THE COURT: All right. I have in front of me a
17 motion by H.E. Services and Robert Backie for relief from the
18 automatic stay to pursue in the Eastern District of Michigan
19 their pending pre-petition litigation alleging among other
20 things breach of contract, promissory estoppel on this
21 representation and civil rights violations.

22 As with every request to obtain relief from the
23 automatic stay in respect of an unsecured claim, including this
24 here, to pursue pre-petition litigation, the Court considers
25 those factors laid out by the Second Circuit. In its *Sonnax*

1 case, 907 F.2d 1280 at 1286 (2d. Cir. 1990) that are relevant
2 to determine whether there is a basis even with respect to an
3 unsecured claim to permit the liquidation of that claim
4 notwithstanding the automatic stay. Based on my review of the
5 papers and the factors, I conclude that the stay should not be
6 lifted. The relevant factors here are whether relief would
7 result in a partial or complete resolution of the issues, lack
8 of any connection with or interference with the bankruptcy case
9 whether a specialized tribunal with necessary expertise has
10 been established to hear the cause of action, whether the
11 debtors' insurer has assumed full responsibility for the
12 defense, whether the action primarily involves third parties,
13 the interest of judicial economy and the expeditious and
14 economical resolution of litigation, whether the parties are
15 ready for trial in the other proceeding and the impact of the
16 stay on the parties and the balance of harms. And, by the
17 parties, I include not only the debtors but their other
18 unsecured creditors.

19 The litigation is not, based on my understanding,
20 particularly well developed in the Michigan court. Litigation,
21 importantly, does not appear to be covered by insurance so
22 recovery would be -- you know, if there's a ruling favorable to
23 the plaintiffs against the debtors' estate, and I believe that
24 at this stage is the case, it is not therefore appropriate to
25 force the debtors to engage in such litigation to liquidate a

1 claim well in advance of a general claim liquidation procedures
2 in the case. As noted by Mr. Butler this morning, for the
3 first time at oral argument at the preliminary hearing on this
4 matter, counsel for the movants raised the issue that the
5 Court, if the litigation were ultimately to be tried in an
6 adversary proceeding, would not have jurisdiction under 28
7 U.S.C. 157(b)(2)(0) which provides that personal injury, tort
8 or wrongful death claim are solely from the district court's
9 determination. As I noted at that hearing, if that fact or if
10 that assertion were true as a matter of law, that would be an
11 additional factor, although not dispositive, in the Sonnax
12 analysis. It would not be dispositive because the Courts have
13 recognized that notwithstanding Section 157(b)(2)(0) the
14 bankruptcy court may generally deal in the preliminary stages
15 with personal injury claims. However, it would be a
16 significant factor in that this Court could not ultimately
17 determine the matter if it were to be litigated in an adversary
18 proceeding.

19 However, based on the supplemental briefs filed on
20 the matter as well as the Court's own research, I conclude that
21 the law in the Southern District of New York in respect of this
22 type of claim is contrary to the movants' contention. While
23 this is not a dispositive ruling on the Section 157(b)(2)(0)
24 issue, it appears to me that the law in the Southern District,
25 including at the district court level, as well as a proper

1 reading of the statute, would limit the statute so that it
2 would modify to this type of commercial dispute. See, in
3 addition to the cases cited by the debtors in their
4 supplemental memorandum, In re Finley, 194 B.R. 728, 734
5 (S.D.N.Y. 1995) and In re Cohen 107 B.R. 453, 455 (S.D.N.Y.
6 1989).

7 So I'll deny the motion at this time and you can
8 submit an order to that effect, Mr. Butler, after running it by
9 counsel.

10 MR. BUTLER: Thank you, Your Honor.

11 THE COURT: Okay.

12 MR. BUTLER: Your Honor, the next matter on the
13 agenda is matter number 39. This is the MobileAria Sale motion
14 at Docket No. 4040.

15 Your Honor, we are here today to deal with the
16 Court's approval on that request, the Court's approval for the
17 sale of substantially all the assets of MobileAria, Inc., one
18 of the debtors in these Chapter 11 cases, to Wireless Matrix
19 U.S.A., Inc.

20 As Your Honor may recall, we were here at a prior
21 hearing in getting approval of bid procedures. We got approval
22 of bid procedures with respect to an asset sale and purchase
23 agreement with Wireless Matrix U.S.A., Inc. which was the
24 stalking horse in connection with this transaction. And there
25 were procedures that were established by the Court at the prior

Exhibit B

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481AM

- - - - -x

In the Matter of:

DELPHI CORPORATION, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

June 19, 2006

10:10 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

1 MR. BUTLER: Your Honor, the next matter up is, going
2 back to the agenda order, is matter number 13. This is the H.E
3 Services Company lift-stay motion filed at Docket No. 2705 with
4 related pleadings as indicated on the amended agenda.

5 This involves a lift-stay matter to deal with pending
6 actions arising out of a minority supplier relationship. And I
7 believe Counsel is here to present the motion.

8 MR. MASTROMARCO: Good morning, Your Honor. Victor
9 Mastromarco on behalf of the claimant. This is Docket No. 2705
10 originally filed. Our lift-stay motion as it relates to a
11 filing, a complaint that was filed on February 16th, 2005
12 before the United States District Court for the Eastern
13 District of Michigan, northern division.

14 The claims involve a number of different claims.
15 One, in particular, that I want to emphasize is the civil
16 rights violations pursuant to 19 -- Section 1981. There are
17 also claims for promissory estoppel and misrepresentation and
18 breach of contract. Originally, after the complaint was filed
19 in February, Delphi responded -- the debtor responded with a
20 motion to dismiss which resulted in an amended complaint being
21 filed which we have provided to the Court. When Delphi failed
22 to answer the amended complaint, we applied for a default
23 before the judge and Delphi then later responded with another
24 motion to dismiss. Those actions were pending. They had been
25 set for hearing for November 2 at the same time as a scheduling

1 conference had been set and as a result, the stay was entered
2 in October so those matters did not go forward.

3 THE COURT: Was that first motion to dismiss heard?
4 Or did the claimant just amend the complaint?

5 MR. MASTROMARCO: It was heard and it resulted in an
6 amended complaint being filed.

7 THE COURT: Okay.

8 MR. MASTROMARCO: The -- I wanted to indicate that
9 because the complaint is premised in part of 42 USC 1981 which
10 states a discrimination claim on behalf of not only Mr. Backie,
11 who is a minority in his individual capacity, but also on
12 behalf of H.E. Services, which is a minority company, and both
13 those claims the Courts have held in the past in this district
14 that discrimination claims should be handled akin to personal
15 injury claims and thus our subject to Section 157(b)(5).

16 In the case that I'd like to cite to the Court,
17 Erickson v. Erickson, at 330 BR 346, the Court -- and that's a
18 September 15, 2005 decision -- the Court states on page 349,
19 "pursuant to 28 USC 15" -- I'm sorry -- "157(b)(2)(o), a
20 bankruptcy court may not hear and determine a personal injury
21 tort claim." Citing to the footnote, 157(b)(2)(o) provides in
22 relevant part that a bankruptcy court may hear and determine
23 proceedings affecting the adjustment of the debtor/creditor
24 relationship except personal injury tort claims. 157(b)(5)
25 provides "the district court shall order that the personal

1 injury tort and wrongful death claims shall be tried in the
2 district court in which the bankruptcy case is pending or in
3 the district court in the district in which the claim arose as
4 determined by the district court in which the bankruptcy case
5 is pending."

6 Although there are court rulings to the contrary, the
7 Court in Erickson agreed that -- with Judge Weil that "claims
8 alleging that a debtor illegally discriminated an employment on
9 the basis of race, creed, disability or sex are personal injury
10 tort claims." Citing the Strands v. Ice Cream Liquidation,
11 Inc. case at 281 BR 154 at 161.

12 The Court goes on to indicate --

13 THE COURT: None of this is briefed in your papers,
14 right?

15 MR. MASTROMARCO: No, we did not cite these cases,
16 Judge.

17 THE COURT: Or the issue, generally, right?

18 MR. MASTROMARCO: Well, you're right. We'd ask the
19 Court to take judicial notice of Section 157(b)(5).

20 THE COURT: Okay.

21 MR. MASTROMARCO: We would indicate that the Erickson
22 case also citing In re New York Medical Group, P.C. --

23 THE COURT: I'll read it. You don't have -- this is
24 not productive. I'll read the case.

25 MR. MASTROMARCO: All right. The upshot is this. If

1 we apply the Sonnax Industry standards to a discrimination
2 case, because this Court cannot liquidate the discrimination
3 claims, the Court in Erickson comes to the conclusion that it's
4 readily apparent that the movant is entitled to relief from the
5 stay so she may liquidate the claim.

6 Here is the same situation. We must liquidate that
7 claim or those claims in order to place a value for the Court
8 then to determine how that would fit in with the bankruptcy
9 situation. That's all we're asking the Court to do, is to
10 allow us to go back to the U.S. District Court, allow us to
11 liquidate that claim there and then -- and those other claims
12 there since the judicial economy would suggest that all the
13 claims should be allowed and grant an order accordingly.

14 THE COURT: Okay.

15 MR. BUTLER: Your Honor, just -- seeing as Counsel
16 dealt with the history, let me just briefly address the history
17 of this case. The complaint was originally filed out of a
18 minority supplier relationship alleging that the supplier
19 didn't get the contracts it would have liked to have gotten
20 from Delphi. A complaint was filed on February 16th of '05.
21 It was dismissed on May 19th of 2005. There was an amended
22 complaint filed on June 9th of 2005. The answer would have
23 been due on or about July 9th. The answer was filed, in fact,
24 on July 11th. Counsel tried to get a default judgment. The
25 clerk would not enter it because there was a power outage in

1 Saginaw, Michigan during that period of time and there was some
2 issue about the ability to actually prepare or file anything
3 over a couple day period. And so the Court deemed the filing
4 on July 11th timely, although Counsel has filed a motion to
5 dismiss which is pending -- excuse me, a motion for default
6 judgment, which is pending before that Court.

7 On August 24th, 2005, Delphi filed its second motion
8 to dismiss and we concur that there was a scheduling conference
9 set for November 2nd of 2005 which did not take place.
10 Instead, the federal judge in that case administratively closed
11 the litigation on October 24th, 2005 following the commencement
12 of Chapter 11 cases on October 8th.

13 Now, that's the sum and substance of the activity in
14 this litigation which is in its infancy. And the debtors, you
15 hear, is whether counsel chooses to color the complaint a
16 discrimination complaint or a breach of contract complaint, as
17 they do in their complaint, to where they talk about breach of
18 contract and other theories. The fact is that we think under
19 Sonnax, and we've advised counsel of this -- he knows that we
20 don't have insurance to cover the liability associated with
21 this particular claim -- that we're not prepared for trial.
22 This is involved in its infancy. There's been nothing in this
23 case beyond the second motion to dismiss to be filed. There's
24 been no discovery of any kind. And we believe, under Sonnax,
25 Your Honor, that the balance of the harms weighs very much in

1 the favor of denying the H.E. Services motion at this point in
2 the debtors' Chapter 11 case.

3 I point out, Your Honor, that H.E. Services filed a
4 supplement to its motion at Docket 3263 where it said that this
5 motion was very similar to the Automotive Technologies
6 International where you granted some relief at Docket No. 3200.
7 The facts are those cases are very different. The ATI cases
8 had been filed years earlier and the ATI cases were actually on
9 appeal, the issues had been fully briefed in the appellate
10 courts and the parties were simply waiting oral argument. A
11 very different case than a complaint filed that had been
12 dismissed and then refiled and was waiting a second motion for
13 dismissal.

14 Your Honor, we believe that, as I said and as our
15 responsive papers said, that under the Sonnax factors, we think
16 they clearly weigh in favor denying the motion at this time.
17 Thank you.

18 THE COURT: Do you have any view on the 28 USC
19 157(b)(5) point?

20 MR. BUTLER: Your Honor, I hadn't reviewed the matter
21 because -- you're right, it hadn't been raised or briefed.
22 But, even if it were so, I don't think that with respect to
23 Sonnax, says that gives anyone -- I mean, the carte blanche to
24 come in and get those stay lifts in every case. I mean, if
25 that were the law, then anyone who had any kind of a tort claim

1 here would always win their motion to lift-stay. And that's
2 not the law in this district. The fact is Sonnax still gets
3 applied against tort claims and against other claims that may
4 not ultimately be liquidated by Your Honor. The fact is that
5 under Sonnax, this estate, at this moment in time, when we are
6 involved in some of the most sensitive issues in the case in
7 terms of the ultimate transformation, shouldn't have to be --
8 should have the protection of the automatic stay and not have
9 to deal with claims issues of this nature at this time. And
10 that's why I think that because there's no insurance here,
11 because we would have to treat this as a full-blown hundred
12 million dollar litigation, as Counsel suggests, and have to
13 take the time to resources, both externally and internally, to
14 defend it, under Sonnax, at this point in our case, it would be
15 inappropriate to lift the stay to permit that.

16 And I don't think the 157 issue has -- while it may
17 have some bearing on it ultimately, at some future date, I
18 don't think it really comes into the calculus, Your Honor, in
19 weighing the harms and balancing the harms in terms of the
20 Sonnax factors for this hearing today.

21 THE COURT: Okay.

22 MR. BUTLER: Thank you, Your Honor.

23 MR. MASTROMARCO: Briefly, Your Honor, may I respond?

24 THE COURT: Sure.

25 MR. MASTROMARCO: Not only does it -- is it an

1 important factor in the Sonnax analysis, but the cases that I
2 cited suggest that it's probably the only factor that the Court
3 can consider because of the fact that all these arguments that
4 are being made that we don't want to deal with it at this time,
5 we don't want to handle this at this time, this is going to
6 upset these other things, those claims have to be liquidated.
7 So, we have to deal with it now because we have to know, we
8 have to be able to put those claims back to the District Court
9 and I'd cite again to Erickson where they say "proof that the
10 debtor intentionally and maliciously injured the movant by
11 illegally discriminating against her necessitates proving the
12 underlying discrimination allegations which the bankruptcy
13 court lacks jurisdiction to hear." And that's Black Letter Law
14 in New York, Second Circuit.

15 So, I would ask that the Court allow us to go back to
16 the -- and when we look at the factors, we're saying is this
17 Court better equipped to handle it than the U.S. District Court
18 judge as it relates to these specific issues? Yes, I think
19 that the U.S. District Court judge is a good form for this
20 matter to be tried. He's familiar with the issues, he's dealt
21 with motions to dismiss -- and I'm not going to go and argue
22 with Mr. Burke today about what occurred in the lower court --
23 or in the district court, I should say -- but the fact is that
24 they have local counsel there. They have them assigned not
25 only to the H.E. Services case, but they got the same counsel

1 assigned on the Cindy Palmer case, which we're going to argue
2 next. And this is not going to be taking away from the
3 debtors' efforts in this case because they -- this Court has to
4 grapple with that liquidation issue.

5 And so, we would ask that the Court allow the
6 district court judge or -- lift the stay so that the district
7 court judge can hear these claims.

8 THE COURT: Okay. All right. I have in front of me
9 a motion by H.E. Services for relief from the automatic stay to
10 pursue litigation in Michigan District Court that was pending
11 before the commencement of the debtors' Chapter 11 cases.

12 It's averred by the debtors, and I don't think
13 disputed by the movant, that there either is no insurance
14 coverage for this litigation or there's an issue as to whether
15 there is insurance covering the claim -- is obviously an
16 unsecured claim, as well, given that fact and given the Second
17 Circuit's case, *In Re Sonnax Industries*, 907 F2d. 1280 (2nd
18 Cir. 1990), which says that a movant seeking a lift from the
19 automatic stay must make an initial showing of cause.

20 I had originally believed, based on my review of the
21 papers, that I did not need to get into the various Sonnax
22 factors given that it did not appear that such an initial
23 showing had been made. That is because, again, it's recognized
24 by the Courts in this district that relief from the automatic
25 stay to pursue the liquidation of an unsecured claim is

1 unusual, and extraordinary circumstances normally need to be
2 shown, such as the fact that there is full insurance coverage
3 or the claim is being liquidated really for the purpose of
4 going against a third party or there's a special tribunal in
5 which it is being heard. It was not stated in the motion
6 papers, but it was stated at oral argument, that
7 notwithstanding in plain language of 28 USC Section 157(a)(5)
8 which deals with personal injury, tort and wrongful death
9 claims and was obtained by the plaintiffs' bar in light of the
10 mass tort asbestosis litigation that affected bankruptcy courts
11 and cases before the enactment of that provision that that
12 provision applies to at least one of the claims asserted in
13 this litigation which is an antidiscrimination civil rights
14 violation claim.

15 I will need to review the case law on that issue.
16 However, applying the Sonnax factors and giving the movant the
17 benefit of the doubt on that issue based on the representation
18 to the Court, I believe and find that there's a reasonable
19 likelihood that the debtor will prevail on the motion and,
20 therefore, I'm going to treat this as the preliminary hearing
21 on the motion and we'll adjourn to the next omnibus date under
22 362(e).

23 In looking at the Sonnax factors, it appears to me
24 that the only one of them that may apply here in the movant's
25 favor is the factor pertaining to whether a specialized

1 tribunal had been established to hear the cause of action.
2 And, of course, it's asserted that the District Court is not
3 particularly a specialized tribunal but that it has
4 jurisdiction to the exclusion of the bankruptcy court with
5 regard to the trial of the matter under 28 USA Section
6 157(a)(5). On the other hand, that rule may not be dispositive
7 given the status of the debtors' case. Among other things, the
8 bar date has not run yet and the debtors are in the early
9 stages, if at all, in dealing with the claims against them.

10 So, again, it appears likely to me that the debtor
11 will prevail but I'll review this case law that's been asserted
12 and adjourn the hearing until the next omnibus date.

13 MR. BUTLER: Thank you, Your Honor. Your Honor, do
14 you want any more from the parties on this matter for the next
15 omnibus date or just that the Court's going to take it under
16 advisement?

17 THE COURT: The debtors are free to file something if
18 they wish. I'm not telling them that they have to. I'll
19 review the case law myself, but if you want to file something,
20 you can do that.

21 MR. BUTLER: Thank you, Your Honor.

22 MR. MASTROMARCO: Your Honor, if the debtor does, I
23 would also like the Court to allow me to file a short brief
24 setting forth these issues that I've --

25 THE COURT: Well, but you've already -- you took

1 today as the opportunity to do that and --

2 MR. MASTROMARCO: A limited brief, Judge.

3 THE COURT: -- in my mind, that's sufficient.

4 MR. BUTLER: Your Honor, the next matter on the
5 agenda is matter number 14. This is the Cindy Palmer lift-stay
6 motion filed at Docket No. 2708. And again, I'll defer to
7 Counsel for presenting the motion.

8 MR. MASTROMARCO: Victor Mastromarco on behalf of the
9 estate. This is a personal injury cause of action where the
10 plaintiff's decedent was crushed in a machine and the case had
11 been filed originally back in 2001 and went through a lot of
12 discovery. The trial court had granted a motion on behalf of
13 Delphi for summary -- what we call summary disposition, which
14 is similar to Rule 56 in federal court. The case had gone to
15 the Court of Appeals and oral arguments had been set for
16 October 12, 2005 and the bankruptcy stay was entered three days
17 before that argument date.

18 What we're asking for is again, pursuant to Rule 157
19 that we've cited in the Backie matters, (b)(5), that we be
20 allowed to pursue this matter in the state appellate court or
21 have it removed to the federal district court to decide whether
22 it should go to the Court of Appeals and resume arguments
23 there.

24 We were at the end of the road with the Court of
25 Appeals, although that's the first stage of appellate review in

1 Michigan. We would ask that we be allowed to do several
2 things: number one, have the oral arguments since all the
3 briefs have been submitted by the parties. Everyone is
4 ready -- was ready to go. We had already prepared for the
5 hearing. If in the event that the Court of Appeals rules
6 against us on that motion, we would ask that the Court also in
7 the same order allow us to avail ourselves of the application
8 procedures to the Supreme Court for the State of Michigan. In
9 the event that we are successful, we would ask that the Court
10 allow us to go back down to the state court and have that Court
11 determine and liquidate the claim and then, of course, if, in
12 fact, we are successful, we would want that the Court here
13 would have exclusive jurisdiction over any of those issues
14 pertaining to how that would fit into the debtors' estate.

15 I am unaware -- I believe there may be insurance
16 involved but I cannot indicate that for a fact for the Court
17 because we never asked that when we were in the underlying case
18 and I haven't asked that here.

19 THE COURT: Okay.

20 MR. BUTLER: Your Honor, again, just with Counsel's
21 recitation of the record below, just so the record here is
22 clear, in 2001 there was a wrongful death action filed. In
23 November 2002, there was -- summary disposition was granted in
24 favor of Delphi Corporation and a series of other defendants at
25 that time. This made its way to the Michigan Court of Appeals

1 where it was to have been heard in oral argument on October
2 12th of 2005. Obviously, our bankruptcy intervened as to
3 Delphi Corporation on October 8th and that argument did not
4 occur vis-a-vis the Palmer estate and Delphi Corporation.

5 It did continue as to all the other defendants on
6 November 8th, 2005. The Michigan Court of Appeals affirmed the
7 orders of the circuit court granting defendants' motions for
8 summary disposition until the matter's been concluded as to all
9 of the parties. We had indicated to Counsel, and I'll indicate
10 again on this record, that we would not oppose a modification
11 of the automatic stay, if that's what Counsel wants, to go and
12 have the same argument in front of the Michigan Court of
13 Appeals. That matter has been fully briefed and we do believe,
14 as we have in some other matters, based on the Sonnax factors
15 and otherwise, that if that's what they want to do, it's not
16 undue hardship to expend the time and effort to go and make
17 that argument in front of the Court of Appeals.

18 We do think, Your Honor, however, should ask the
19 counsel to come back to this Court and justify a subsequent
20 time under the Sonnax factors either for an appellate
21 litigation in the Michigan Supreme Court and, certainly, going
22 back to beginning a trial on the merits, which is -- if somehow
23 that would occur. There's been no trial, no discovery, none of
24 that has occurred and so this would be in its infancy again as
25 it relates to that. And when I say no discovery, obviously

1 there's a motion for summary disposition so there was some
2 amount at that point but this has not been something that
3 would -- we think that the movants here are asking for too much
4 relief.

5 So, the debtors are prepared, Your Honor, to agree,
6 as we were, prior to appearing in court today, to a limited
7 modification of the stay to go back to the Michigan Court of
8 Appeals and conclude that phase of this litigation. We'd ask
9 Your Honor to require the Palmer estate to come back to this
10 Court for any further relief beyond that and justify it under
11 the Sonnax factors at that time.

12 THE COURT: Okay. All right. I have in front of me
13 a motion by Cindy Palmer as personal representative of the
14 estate of Michael Palmer for relief from the automatic stay to
15 pursue to its conclusion pending litigation in the State Court
16 in Michigan.

17 The debtor has consented to relief from the stay in
18 part to permit the conclusion of the pending appeal in the
19 Michigan State Court but not any subsequent appeal in the event
20 that the trial court is reversed -- a trial of the litigation.

21 As I said, in connection with the prior motion, when
22 an unsecured creditor seeks relief from the automatic stay to
23 pursue litigation, it needs to establish or pass an initial
24 burden of showing cause under the Second Circuit's Sonnax case.
25 If it meets that burden then it needs to -- the Court needs to